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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

MONICA SANTANA AND PAULA
KLEYNBURD, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v

23ANDME, INC.,

Defendant.

CASE NO. 3:23-cv-05147-EMC

Related Cases: 3:23-cv-05200; 3:23-cv-05579;
3:23-cv-05281; 3:23-cv-05178; 3:23-cv-05198;
3:23-cv-05234; 3:23-cv-05259; 3:23-cv-05302;
3:23-cv-05323; 3:23-cv-05332; 3:23-cv-05341;
3:23-cv-05345; 3:23-cv-05369; 3:23-cv-05419;
3:23-cv-05439; 3:23-cv-05464; 3:23-cv-05541;
3:23-cv-05548; 3:23-cv-05565; 3:23-cv-05635;
3:23-cv-05677; 3:23-cv-05717; 3:23-cv-05768;
3:23-cv-05779; 4:23-cv-06481; 3:23-cv-05980;
5:23-cv-06205; 3:23-cv-06698; 5:23-cv-06719

[Assigned for all purposes to the Honorable
Edward M. Chen]

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO STAY
PROCEEDINGS PENDING TRANSFER BY
THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION ("JPML")**

Date: February 22, 2024

Time: 1:30 p.m.

Courtroom: 5

Defendant 23andMe seeks a stay of all proceedings in at least 30 cases already pending in this Court, to await a ruling on Defendant's JPML motion to transfer and consolidate *all of those same cases to this very Court*. Given that there are only three federal related cases pending outside of this District, it seems unlikely the motion will be granted, but if it is, the likelihood is the litigation will be consolidated here. Defendant argues that staying cases already in this Court pending their transfer back to this Court will promote judicial economy, however, Plaintiffs would be prejudiced by the requested stay (ECF No. 37, the "Motion to Stay"), which would delay their ability to protect their most sensitive personally identifiable information ("PII") and personal genetic information ("PGI"), which continues to be exposed due to 23andMe's alleged data security and privacy shortcomings. Plaintiffs thus urge this Court to deny Defendant's Motion to Stay.

I. PROCEDURAL BACKGROUND

Plaintiffs are consumers throughout the United States who have filed putative class action lawsuits against 23andMe arising from a breach of their personal information, including "DNA Relative" information, without their authorization. To date, 35 cases have been filed in state and federal courts, 30 of which are pending here in the Northern District of California, most have been related to this Court. There are few cases pending outside of the Northern District of California.¹

Plaintiffs' complaints generally allege violations of consumer protection and privacy statutes such as California's Unfair Competition Law, Oregon Genetic Privacy Law, the Illinois Genetic Information Privacy Act, as well as common law claims such as negligence, breach of implied contract, and unjust enrichment.

¹ *Gill v. 23andMe, Inc.*, Case No. 2:23-cv-10527-FWS-DFM (C.D. Cal.);
Bacus v. 23andMe, Inc., Case No. 1:23-cv-16828-MSS (N.D. Ill.);
Hu v. 23andMe, Inc., Case No. 1:23-cv-17079-RRP (N.D. Ill.);
Morgenstern v. 23andMe Holding Co., et al., Case No. CGC23610816 Superior Court for the City and County of San Francisco; and
Vasquez v. 23andMe, Inc., Case No. 23CV424996, Superior Court for the County of Santa Clara

The first filed case in this District, *Santana v. 23andMe, Inc.*, No. 3:23-cv-05147-EMC (the “*Santana* Action”), was filed on October 9, 2023. On November 7, 2023, an Initial Case Management Conference was scheduled for January 23, 2024. (ECF No. 14.) Thereafter, over two-dozen cases have been related to the *Santana* Action, and the Initial Case Management Conference was noticed for that same date in all of the related cases. (ECF No. 35.) On December 21, 2023, Defendant moved to transfer and consolidate all litigation pursuant to 28 U.S.C. § 1407 and Rules of Procedure of the United States Judicial Panel on Multi District Litigation (“JPML”), Rule 6.2 (MDL No. 3098, ECF No. 34-1, the “Motion to Transfer”). The Motion to Transfer is currently pending and may be set for hearing on the JPML’s March 2024 calendar. On December 29, 2023, Defendant filed the instant Motion to Stay. On January 5, 2024, the hearing on the Motion to Stay was re-noticed for February 22, 2024 (E.C.F. No. 44), well after the case management conference scheduled for January 23, 2024 (E.C.F. No. 35).

II. ARGUMENT

This Court should deny Defendant’s Motion to Stay because granting it would prejudice Plaintiffs. Sensitive data including Plaintiffs’ genetics and other identifying information has been exposed and is reported for sale on the Dark Net. Plaintiffs continue to have grave concerns about the ongoing violations of their privacy and their safety, as well as whether such security failures may recur. Where, as here, Plaintiffs have important privacy interests at stake, courts in this District and elsewhere have denied stay requests pending a JPML motion. *See, e.g., In re iPhone Application Litig.*, No. 10–CV–05878–LHK, 2011 WL 2149102 , at *1-2; (N.D. Cal. May 31, 2011); *Block v. Equifax, Inc.*, No. 17-CV-05367-BLF, 2017 WL 10573832, at *1-2 (N.D. Cal. Nov. 13, 2017); *Turrett v. JetBlue Airways*, No. CV-036785-RGK (PLAX), 2003 WL 23171693, at *1-2 (C.D. Cal. Dec. 26, 2003).

A. This Court Has Broad Discretion to Decide Whether To Grant a Stay.

A court “should not automatically stay discovery, postpone rulings on pending motions, or generally suspend further rulings upon a parties’ motion to the MDL Panel for transfer and consolidation.” *Rivers v. The Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997). Rule 1.5 of the Rules of Procedure of the JPML provides the “pendency of a motion [] before the Panel

concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.” Instead, the stay decision is a discretionary one, “incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *In re iPhone*, 2011 WL 2149102, at *2 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Defendant bears the burden to show circumstances justify an exercise of that discretion. *See E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1085, 1088-89 (N.D. Cal. 2018) (citing *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)). Defendant here has not made the requisite showing.

B. The Relevant Factors Weigh Strongly Against Granting a Stay

Pending a JPML motion, courts may consider whether a stay would: 1) conserve judicial resources and avoid duplicate litigation; 2) minimize hardship and inequity to the moving party; and 3) prejudice the non-moving party (Plaintiffs). *In re iPhone*, 2011 WL 2149102, at *2.

1. Defendant seeks transfer to this same Court, which negates any argument that actions *already in this Court* should be stayed to promote judicial economy

Defendant argues “interests of judicial economy and efficiency favor a stay of proceedings here pending a transfer ruling by the Judicial Panel on Multidistrict Litigation.” Def.’s Mot., at 5. Defendant cites cases which state that “transfer of this matter *to another court* would render redundant the efforts of this Court.” *Fuller v. Amerigas Propane, Inc.*, No. 09-2616 THE, 2009 WL 2390358, at *2 (N.D. Cal. Aug. 3, 2009) (emphasis added). This argument ignores the fundamental fact that Defendant’s JPML Motion itself argues that: “The Actions should be consolidated in the Northern District of California.” Def.’s Mot. at 13-15. As Defendant itself argues, this Court is the site of the first-filed case, the site where the majority of the actions are currently pending, and the site of Defendant’s headquarters, records, principals, and employees. *Id.* Defendant is thus requesting a stay of all the cases filed and related in this Court, pending its request that the JPML transfer these cases to this Court. Such a stay would serve only to delay the proceeding and does not serve judicial economy. Compare *Weaver v. Pfizer, Inc.*, No. 2:14-CV-0818 KJM KJN, 2014 WL 2002212, at *2 (E.D. Cal. May 15, 2014) (noting MDL was in South

Carolina); *Fuller*, 2009 WL 2390358, at *1 (noting JPML motion for transfer to Kansas); *Johnson v. Merck & Co., Inc.*, No. C 05-02881 MHP, 2005 WL 8177461, at *1 (N.D. Cal. Oct. 4, 2005) (noting MDL in Louisiana); *Jennings v. Fresenius USA Inc.*, No. 13-CV-03795-WHO, 2013 WL 5487224, at *1 (N.D. Cal. Oct. 2, 2013) (noting MDL in Massachusetts).

Plaintiffs believe JPML centralization is unlikely, which also weighs against a stay. “[C]entralization under Section 1407 should be the *last solution* after considered review of all other options.” *In re Accellion, Inc., Customer Data Security Breach Litig.*, 543 F. Supp. 3d 1372, 1374 (J.P.M.L. 2021) (citing *In re: Alteryx, Inc., Customer Data Security Breach Litig.*, 291 F. Supp. 3d 1377 (J.P.M.L. 2018) (emphasis added)). Where, as here, there are a “small number of involved courts” and it is the “preference of most parties to informally coordinate,” JPML consolidation is disfavored. *In re Accellion* at 1373. Here, the overwhelming majority of the cases are already pending in this court, having been related to the first-filed *Santana* action also pending in this Court (ECF Nos. 20, 24, 33, 45, 46, and 49). As coordination by the JPML appears unlikely, a stay should be denied. Rather, the JPML may be more likely to recommend transfer pursuant to 28 U.S.C. § 1404(a), since the out of district cases could have been originally filed in this District due to Defendant’s headquarters being located here. *See In re: Gerber Probiotic Prod. Mktg. & Sales Pracs. Litig.*, 899 F. Supp. 2d 1378, 1380 (J.P.M.L. 2012) (explaining “why transfer under Section 1404(a), in particular, is sometimes preferable to centralization” because “transfer under Section 1404(a) . . . can result in a more streamlined action, without the procedural necessity of remand to the transferor court that is required under Section 1407.”). Since Defendant has not met its burden to demonstrate judicial economy would derive from a stay of proceedings, this Court should deny the request. *See Sanctuary Covenant*, 354 F. Supp. 3d at 1088-89; *Rivers*, 980 F. Supp. at 1360.

2. Defendant would suffer no prejudice from denial of a stay

Defendant argues “hardship and financial burden to 23andMe of litigating the ‘same issues’ in ‘multiple forums’ favors the entry of a stay pending transfer by the Judicial Panel on Multidistrict Litigation.” Def.’s Mot. at 6. Absent a stay, Defendant claims, “23andMe ‘may be forced to re-litigate issues before the MDL’” and denying a stay “would force 23andMe to

engage in unnecessary and redundant pretrial proceedings and motions practice pending transfer to the MDL.” *Id.* In other words, Defendant’s alleged “prejudice” shares the same considerations as the “judicial economy” factor addressed in the previous section. Where JPML coordination is unlikely – and, even if granted, would land the parties back in this same Court – its argument of hardship based on duplicative proceedings is unavailing. In the unlikely event that either redundant motions or duplicative discovery actually materialize, this Court could postpone deadlines as appropriate without granting a stay. *See Equifax*, 2017 WL 10573832, at *2 (denying stay but continuing all deadlines until after the JPML issues a decision); *see also In re iPhone*, 2011 WL 2149102, at *3-4 (denying stay but limiting discovery pending JPML decision). Defendant would suffer no hardship, financial or otherwise, from denial of stay.

3. Ongoing harm to plaintiffs in data and privacy breach cases, as here, constitutes prejudice disfavoring a stay

Risk of imminent, ongoing injury to non-moving-party plaintiffs in data and privacy breach cases can defeat a stay, even where other factors favor a stay. *Equifax*, 2017 WL 10573832, at *1-2; *Terkel v. AT&T Inc.*, Nos. 06 C 2837, 06 C 2680, 2006 WL 1663456, at *1-3 (N.D. Ill. June 9, 2006). A stay would delay Plaintiffs prosecution of their case to learn the parameters of and to address the ongoing and evolving injury. Furthermore, denial of a stay is appropriate where “a simple monetary remedy” is unavailable, as where plaintiffs-victims’ harm is invasion of privacy. *See Fuller*, 2009 WL 2390358, at *1 (a stay pending JPML transfer may be proper where there is a “harm that has a simple monetary remedy should a court eventually enter judgment for the Plaintiffs”).

In *Equifax*, a case involving claims of invasion of privacy due to a data breach, the court denied defendants’ motion to stay pending a JPML transfer decision, even where plaintiffs did not oppose the requested stay. 2017 WL 10573832, at *1. Judge Freeman recognized that “a stay will limit [plaintiffs’] ability to seek immediate relief from the Court in the event that Defendants’ conduct in addressing the security breach threatens their interest.” *Id.* As the events concerning the alleged data breach were “rapidly evolving, this possibility of harm to Plaintiff

disfavors a stay.” *Id.* The court denied the Equifax motion to stay, even though a stay might economize judicial resources. *Id.*, at *2.

Judge Koh in *In re iPhone* also denied a stay pending a JPML motion in matters involving allegations of defendant Apple Inc.’s “continuing to commit[] privacy violations by illegally collecting, using, and distributing iPhone, iPad, and App Store users’ personal information.” 2011 WL 2149102, at *1. Defendant had filed a JPML motion to transfer cases *into* the Northern District of California. *Id.* Potential prejudice to plaintiffs weighed in favor of denying a stay because “on-going privacy violations” would be “clearly prejudicial to Plaintiffs’ interests in a timely resolution of their claims.” *Id.*, at *3.

Similarly, in *AT&T*, 2006 WL 1663456, at *1, the court denied defendants’ requested stay pending a JPML decision in a case alleging that AT&T unlawfully disclosed personal identifying information to the National Security Agency. Plaintiffs sought temporary injunctive relief over concern that tortious conduct was ongoing and therefore opposed a stay. *Id.* The court denied the stay, even while noting that judicial economy “favors a stay to some extent” given the alleged “significant overlap between this case and the others that have been filed around the country” (*id.*, at *2), because of the countervailing prejudice to plaintiffs. *Id.*, at *2-3. Plaintiffs contended information in which they had a significant statutory privacy interest “has been and is still being disclosed.” *Id.* Although the court was not “in a position at this point to assess the merits of the case,” the threat of “ongoing irreparable harm, if the Terkel plaintiffs’ allegations are shown to be true, is a serious one.” *Id.* Because a stay would facilitate ongoing injury, it was denied. Ongoing harm to plaintiffs in data and privacy breach cases therefore constitutes prejudice disfavoring a stay. *See also*, *Turrett*, 2003 WL 23171693, at *1-2 (denying stay pending JPML decision in a case of privacy violation).

The named Plaintiffs and the absent class members will be prejudiced by a stay in the same manner as the data privacy breach victims in *Equifax*, *In re iPhone*, and *AT&T*. Here, injury is evolving and ongoing, as Plaintiffs have suffered from the exposure of extremely sensitive information, and the genealogical information of Plaintiffs and the absent class members now is available on the dark web. This includes DNA Relatives information, which provides a genetic

map of Defendant's users who might be related, identified by victims' names, sex, dates of birth, geographical location, and genetic ancestry results.² Likewise, hackers obtained predicted relationships with others, the amount of DNA users share with matches, ancestry reports, self-reported locations, ancestor birth locations, family names, and profile pictures.³

Plaintiffs seek to move forward in this case as expeditiously as possible in order to investigate and mitigate what appears to be expanding harm (as compromised information spreads across the internet) from the unauthorized access to their private information remaining in Defendant's systems.⁴ Recurrent and repeated injury is, unfortunately, a real concern here. Once unauthorized access and exfiltration occurred, hackers used Defendant's search feature to find genetic relatives of hacked victims, thereby turning the relatives into victims, and obtaining personal identifying information of entire genetic family trees.⁵ At best it remains unclear whether Defendant has initiated sufficient measures to secure its systems against this ongoing threat. The chain of security is only as strong as its weakest link, and Defendant has not proven the ability to protect it.

Plaintiffs should have prompt access to the Court to address Defendant's catastrophic data security failure. Case management should be expeditious; proceedings should not be stayed, and discovery should commence in a timely manner. By this approach, Plaintiffs can discover the cause of the breach and understand the extent to which their sensitive information

² Aaron Katersky, *Connecticut attorney general presses 23andMe for data breach answers*, ABC News, October 31, 2023, <https://abcnews.go.com/US/connecticut-attorney-general-presses-23andme-data-breach-answers/story?id=104510476> (Last accessed 1/12/2024.)

³ Emma Roth, *23andMe admits hackers accessed 6.9 million users' DNA Relatives data*, The Verge, December 4, 2023, <https://www.theverge.com/2023/12/4/23988050/23andme-hackers-accessed-user-data-confirmed>. (Last accessed 1/12/2024.)

⁴ Pieter Arntz, *23andMe says, er, actually some genetic and health data might have been accessed in recent breach*, Malwarebytes Labs, December 4, 2023, <https://www.malwarebytes.com/blog/news/2023/12/23andme-says-er-actually-some-genetic-and-health-data-might-have-been-accessed-in-recent-breach>. (Last accessed 1/12/2024.)

⁵ Emma Roth, *23andMe admits hackers accessed 6.9 million users' DNA Relatives data*, The Verge, December 4, 2023, <https://www.theverge.com/2023/12/4/23988050/23andme-hackers-accessed-user-data-confirmed>. (Last accessed 1/12/2024.)

remains at risk due to Defendant's security measures. While a stay always means delay, the cost of delay is higher the more serious the underlying injury. Here, a delay of several months is significant to those whose most personal information has been compromised. As delay is prejudicial to Plaintiffs, Defendant cannot meet its burden to justify a stay, and its request should be denied. *See Sanctuary Covenant*, 354 F. Supp. 3d at 1088-89.

III. CONCLUSION

No countervailing benefits of a stay exist here, especially where the requested transfer order likely would only transfer the cases back to this Court, accomplishing nothing other than unnecessary delay. As the requested stay would prejudice Plaintiffs, by delaying a remedy for and protection against an ongoing invasion of privacy, Plaintiffs request that this Court deny Defendant's motion.

Dated: January 12, 2024

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